

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 10, SUBREGION 11**

TRANSIT MANAGEMENT OF  
CHARLOTTE, INC.

Employer

and

Case 10–RC–148774

SMART – TRANSPORTATION  
DIVISION

Petitioner

**REGIONAL DIRECTOR’S DECISION  
AND  
ORDER DISMISSING REPRESENTATION CASE PETITION**

The Employer, Transit Management of Charlotte, Inc., is a North Carolina corporation with facilities located at 3145 South Tryon Street and 929-B North Davidson Street, in Charlotte, North Carolina. The Employer provides transit management services to the Greater Charlotte area. Petitioner, SMART-Transportation Division, filed this petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of all full-time and regular part-time operations supervisors, road/street supervisors, dispatch supervisors and dispatchers employed by the Employer at its Charlotte, North Carolina facilities, but excluding all bus operators, maintenance employees, mechanical foremen, and maintenance foremen.<sup>1</sup> A hearing officer of the Board held a hearing during which all parties were given an opportunity to present evidence. The parties made oral arguments in lieu of filing briefs.

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<sup>1</sup> Petitioner is the certified exclusive collective-bargaining representative of the Employer’s Charlotte-area bus operators and maintenance employees in separate, stand-alone units. Petitioner’s Local 1715 services the bus operators unit and Petitioner’s Local 1596 services the maintenance employees unit. The Employer and Petitioner stipulated at the hearing in this matter that bus operators and maintenance employees should be excluded from the unit.

As evidenced at hearing, Petitioner seeks to represent all operations supervisors, a job classification that includes not only the road/street supervisors, dispatch supervisors and dispatchers identified in the petition, but also several other distinctive positions.<sup>2</sup> The sole issue in this matter is whether operations supervisors are supervisors within the meaning of Section 2(11) of the Act. If so, the petitioned-for unit is inappropriate. The Employer contends that operations supervisors are supervisors within the meaning of the Act because they possess the authority to discipline, suspend, transfer, hire, promote, assign, reward, responsibly direct, and adjust grievances.<sup>3</sup> Petitioner asserts that operations supervisors are statutory employees and do not exercise any authority indicative of supervisory status.

I have considered the evidence and the arguments presented by the parties. As discussed below, I conclude that operations supervisors, including managers/field supervisors, Bus Operations and Communications Center managers, radio communications, station managers, run dispatchers, Charlotte Transit Center operations manager, lot supervisors, road/street supervisors, dispatch supervisors and dispatchers, are supervisors within the meaning of Section 2(11) of the

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<sup>2</sup> The unit description on the petition only seeks to include, by name, all operations supervisors, road/street supervisors, dispatch supervisors and dispatchers. However, as noted above, the record demonstrates that the “operations supervisor” position is inclusive of several distinctive positions, including those identified on the petition. As Petitioner did not seek to amend its petition at hearing to identify the distinctive positions in the proposed unit, I conclude that Petitioner is seeking a unit of all operations supervisors, regardless of their distinct position. My conclusion is supported by 1) Petitioner’s inclusion of operations supervisors in the unit description on the petition; 2) the uncontested record evidence, including both testimonial and documentary evidence, that the operations supervisor classification is inclusive of several distinct positions, including those specifically listed on the petition; and 3) the parties’ stipulation at hearing that the sole issue is the supervisory status of distinct positions, all of which are undisputedly classified as operations supervisors.

<sup>3</sup> The Employer concedes that operations supervisors do not possess the authority to discharge, layoff, or recall employees.

Act. Because the petitioned-for unit is comprised entirely of statutory supervisors, I will issue an order dismissing the petition.

To provide a context for my discussion of the issue, I will first provide a brief overview of the Employer's operations, including the bus operations division where operations supervisors regularly work. I will then provide an overview of the operations supervisor position, including a discussion of the general assigned duties, as well as the duties associated with distinct positions within the operations supervisor class. Finally, I will set forth my legal analysis of the issue presented i.e. whether the petitioned-for operations supervisors are statutory supervisors who do not enjoy the right to a Board-conducted representation election to determine whether Petitioner will be their exclusive collective-bargaining representative, or whether they are statutory employees who do.

### **THE EMPLOYER'S OPERATIONS**

The Employer operates the Charlotte Area Transit System, which is the public bus system in the Greater Charlotte area. The Employer currently employs a total of about 850 employees; services 73 bus routes; operates about 250 buses that, in total, drive over 12,000,000 miles each year; and transports about 50,000 to 60,000 passengers each day. The top management official onsite is the general manager, who provides oversight for the entire operation, including both the bus operations division and the maintenance division. As operations supervisors work solely within the bus operations division, the remainder of this section will focus on the Employer's bus operations.

The bus operations division, as the name indicates, is responsible for operating the Employer's bus system, which includes everything connected with the successful operations of the Employer's routes and overall service. A director of operations/assistant general manager

manages the division and reports directly to the general manager. Reporting directly to the assistant general manager are three superintendents; reporting to the superintendents are five lead operations supervisors.<sup>4</sup> The operations supervisors at issue report directly to the lead operations supervisors. There are also approximately 600 bus operators/drivers who are covered by a collective-bargaining agreement between the Employer and Petitioner's Local 1715. The collective-bargaining agreement is effective from December 12, 2013, through June 30, 2016.

### **OPERATIONS SUPERVISORS**

Operations supervisors are tasked with ensuring safe, reliable, and efficient bus service to the public. There are approximately 40 operations supervisors. Their responsibilities include ensuring that all bus operators adhere to the Employer's "Standards of Excellence" work rules, dispatch procedures, and the bus operators' collective-bargaining agreement. Operations supervisors also make certain that bus operators are fit for duty; they document and report collective-bargaining agreement or rule violations; investigate vehicular accidents and other incidents involving buses; investigate customer and employee complaints; and are directed to promote effective employee relations and working relationships with Local 1715 representatives in the bus operators bargaining unit. Operations supervisors are part of the Employer's potential strike-response team. In addition, each operations supervisor is assigned a "Team of Professionals," consisting of about 15 to 20 bus operators. Operations Supervisors perform annual evaluations, ride checks, and training oversight for their team members. If a team member receives discipline, the assigned operations supervisor hands the discipline to the team member. Pursuant to the bus operators' collective-bargaining agreement, operations supervisors can

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<sup>4</sup> During its oral argument, Petitioner agreed with the Employer that the lead operations supervisors should be excluded from the unit.

operate buses and otherwise fill in for bus operators in emergency situations or on an as-needed basis.

As discussed above, the operations supervisor position is inclusive of several distinct classifications. Applicants must first apply to become an operations supervisor. If awarded the position, the applicant is then assigned to one of the following distinct classifications: managers/field supervisors, Bus Operations and Communications Center managers, radio communications, station managers, road supervisors, lot supervisors, street supervisors, Transit Center operations managers, run dispatchers, dispatch supervisors or dispatchers. Operations supervisors do not separately apply for their distinct classification; instead, management determines where the individual's skills will best serve the Employer.

Operations supervisors receive additional duties with their distinct classification. For example, managers/field supervisors must respond to interruptions in bus service; respond to and investigate accidents and incidents occurring on or around buses or the Employer's facilities; and prepare detour routes for bus service in coordination with Transit System planning and customer service departments. Bus Operations and Communications Center managers respond to radio communications from bus operators; direct operators on service issues; dispatch field supervisors, maintenance personnel, operators, replacement buses and emergency services, when needed; and respond to public inquiries regarding buses, detours or service disruptions. Station managers direct and monitor bus and pedestrian activity within the Transit Center; dispatch bus operators, including tripper operators, to work assignments; respond to accidents, incidents or situations occurring on buses or at Transit System facilities; and respond to travel concerns from customers. Road supervisors monitor the radio for accidents and incidents involving buses; respond, investigate and report accidents and incidents; provide assistance to operators if there is

an emergency or detour; and ensure that operators are complying with traffic laws and schedules. Lot supervisors direct and monitor the entrance and exit of buses from the Employer's facilities to ensure that bus operators follow safety requirements, and conduct inventory of buses to ensure sufficient buses are available for daily work assignments. Street supervisors perform service checks of operators; respond to security or service challenges on buses; and identify detours for operators, as needed. Run dispatchers dispatch bus operators out of the two garage facilities; coordinate bus assignments with lot supervisors and maintenance personnel; and run daily dispatch reports. Dispatch supervisors monitor the operator sign-on sheets and available runs; inform extra board operators when routes are available; and provide route guides to operators, as needed. Dispatchers ensure that operators sign in for work and periodically review the operators to make sure that operators are fit for duty with proper uniform and documentation. The record is devoid of any specific duties for the radio communications and Transit Center operations managers, although some of these positions may be identical or similar in nature to the positions discussed above.<sup>5</sup>

## **DISCUSSION**

The sole issue before the Region is whether operations supervisors are Section 2(11) supervisors. Below is an in-depth discussion of the relevant case law and its application to the evidence obtained during the hearing.

### **A. The Test for Supervisory Status**

The traditional test for determining supervisory status is: (1) whether the individual has the authority to engage in or effectively recommend any one of the 12 criteria listed in Section

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<sup>5</sup> The record is unclear regarding the official titles and associated duties for all positions classified as operations supervisors.

2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the individual holds the authority in the interest of the employer. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994). In regard to the first prong of the test, secondary indicia may also be used to augment supervisory status, however, “secondary indicia should not be considered in the absence of at least one characteristic of supervisory status enumerated in Section 2(11).” *Pacific Beach Corp.*, 344 NLRB 1160, 1161 (2005). As to the second prong of the test, the Board examines whether the indicative authority, exercised on behalf of management, requires independent judgment and is not routine in nature. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). The burden of proving supervisory status lies with the party asserting such status. *Oakwood Healthcare*, 348 NLRB 686, 687 (2006). Supervisory status must be established by a preponderance of the evidence. *Id.* at 694. A lack of evidence is construed against the party asserting supervisory status. *Dean & Deluca New York*, 338 NLRB 1046, 1048 (2003).

The Employer asserts that operations supervisors are supervisors within the meaning of Section 2(11) of the Act because they exercise independent judgment in carrying out their authority to discipline, suspend, transfer, hire, promote, assign, reward, responsibly direct, and adjust grievances for the bus operators. As I conclude below, the record evidence demonstrates that operations supervisors effectively recommend the discipline of bus operators and, therefore, are supervisors within the meaning of the Act. Although the Employer asserts that operations supervisors possess other indicia of supervisory status, there is insufficient evidence to establish that they have that authority.

## **B. The Authority to Discipline**

The evidence establishes that operations supervisors have authority to effectively recommend discipline. To confer Section 2(11) supervisory status, a purported supervisor's disciplinary authority must lead to personnel action, without independent investigation or review of other management personnel. *Republican Co.*, 361 NLRB No. 15, slip op. at 5, 2014 WL 3887221, \*8 (2014). The Board has held that, "Warnings that simply bring the employer's attention to substandard performance without recommendations for future discipline serve a limited *reporting* function, and do not establish that the disputed individual is exercising disciplinary authority." *Id.* (emphasis in original), citing *Williamette Industries*, 336 NLRB 743, 744 (2001). Likewise, the authority to issue a mere verbal reprimand is too minor a discipline to constitute supervisory authority. *Id.* On the other hand, that Board has found that individuals with the authority to issue counseling forms, which "are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee," are supervisors within the meaning of the Act. *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007) citing *Promedica Health Systems*, 343 NLRB 1351 (2004), *enfd.* in relevant part 2006 WL 2860771 (6<sup>th</sup> Cir. 2006), *cert. denied* 549 U.S. 1338 (2007).

The Board also requires the authority to discipline be based on independent judgment. For example, the authority "to order intoxicated or insubordinate employees to leave the workplace does not constitute the statutory authority to discipline employees, as such violations are so egregious and obvious that little independent judgment is needed." *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). See also *Dad's Foods*, 212 NLRB 500, 501 (1974).

Here, the Employer has met its burden to establish that operations supervisors have the authority to discipline bus operators. The progressive disciplinary procedure for operators is set



forth in both the Employer's Standards of Excellence work rules and the bus operators' collective-bargaining agreement. It provides that for each progressive violation of the Standards of Excellence work rules, an operator will receive, in order, a verbal warning, written warning, final warning, and then is subject to discharge.

Operations supervisors, or other acknowledged supervisory officials, initiate the progressive disciplinary procedure by completing a Form 67 Report, "Notice of Personnel Record Entry," when they observe an operator violating the Standards of Excellence work rules.<sup>6</sup> The 67 Report must contain a description of the violation and cite the applicable Standards of Excellence work rules provision that the operator violated. Once the operations supervisor completes the form, it is electronically submitted to the transportation administrator, who is a clerical employee, as well as the assistant general manager, superintendents, and the operations supervisor for the reported operator. Thereafter, the transportation administrator completes a Form 1506, "Notice of Personnel Record Entry" (1506 Report) based on the information provided in the 67 Report and assigns the appropriate level of discipline based on her review of the reported operator's personnel file and in compliance with the progressive disciplinary procedures. Thus, for example, if the employee has no prior discipline, the transportation administrator will indicate that the discipline is a verbal warning on the 1506 report; if the employee already has a verbal warning, the transportation administrator will set the discipline as a written warning on the 1506 report. The administrator will do the same through each step of the progressive disciplinary system, subject to objective provisions of the rules and collective-

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<sup>6</sup> There was some conclusory testimony that individuals in other departments, including safety employees, Transit System safety employees, quality control managers, and radio room employees may complete a 67 Report. However, there was no evidence presented regarding the supervisory status of these individuals or the circumstances in which they would issue these reports. The overwhelming record evidence — both testimonial and documentary — establish that operations supervisors primarily complete the 67 Reports.

bargaining agreement that may affect the level of discipline. The 1506 Report is essentially the Employer's disciplinary form. The transportation administrator then transmits the 1506 Report to the operations supervisor assigned to the operator and the operations supervisor physically issues the discipline.

The superintendents, assistant general manager, or general manager can intervene in the process and modify the level of discipline or determine that the discipline is unwarranted. However, the assistant general manager testified that although he receives electronic alerts when the 67 Reports are submitted to the transportation administrator, he does not regularly review all of the reports. He instead limits his review to those that could result in discharge. The record evidence demonstrates that, at least on one occasion, a superintendent reviewed a video recording of an incident reported on a 67 Report. However, the record is devoid of any further evidence that superintendents regularly independently investigate or otherwise intervene following the submission of a 67 Report.

A former operations supervisor testified that she was specifically told that operations supervisors cannot issue discipline despite that they complete and submit the 67 Reports. This statement is essentially accurate, but misleading. Operations supervisors cannot directly issue the 1506 Report, which constitutes the discipline. They report the infraction and the transportation administrator then researches the operator's history and reviews the progressive disciplinary procedure to determine the level of discipline to impose on the employee under the Employer's progressive disciplinary procedure. Thus, even assuming that operations supervisors were told that they cannot issue discipline, the overwhelming evidence demonstrates that they effectively recommend discipline. There is little to no independent review of the supervisor's 67 report and the transportation administrator's role in converting the 67 report into discipline in the

form of the 1506 report, is a ministerial or clerical function of ascribing to the report the level of discipline called for under objective and well-established company procedures. Consequently, completing the 67 report is far more than simply a reporting function that leaves to the discretion of a higher level manager whether to issue discipline as a result of the report. Completing the report *necessarily* results in *some* level of discipline being imposed upon the reported employee. The question as to what discipline will be imposed is also not routinely left to the discretion of a higher level manager. That question is resolved by applying established company procedures to the specific employee's disciplinary record. Thus, if the operations supervisor knows the employee's disciplinary history, he or she also knows that the prescribed level of discipline *will* be imposed on the employee if the supervisor submits the form, subject to only rarely exercised intervention of a higher level manager.

That the operational supervisor has authority to effectively recommend discipline is further supported by their admitted discretion in deciding whether to coach or counsel an operator in response to an infraction or to formally initiate the progressive disciplinary procedure by submitting a 67 Report. The assistant general manager testified that operations managers have the discretion to verbally coach an operator instead of submitting a 67 Report. Petitioner's witnesses corroborated his testimony. Both confirmed that in their role as operations supervisors, they can independently decide whether to verbally counsel an operator or formally submit a 67 Report. In discussing this discretion, a current operations supervisor testified, "Everything doesn't have to be reported." He admits that there are times when he does not report infractions using a 67 Report; instead, he verbally warns an operator about the observed violation (for example, using a cell phone), despite that the conduct is subject to formal discipline. Accordingly, although operations supervisors do not have the discretion to determine

the level of discipline, they clearly exercise discretion and independent judgment when they elect to complete the report which, in effect, initiates the progressive disciplinary procedure and lays the foundation for formal discipline. See *Oak Park Nursing Care Center*, 351 NLRB at 30 (finding employee counseling forms are disciplinary where each form corresponded to a step in the progressive disciplinary process and “routinely result[ed] in actual discipline”). Compare *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) (“[r]eporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations”), citing *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000); *Ohio Masonic Home*, 295 NLRB 390, 393-394 (1989) (warnings not disciplinary where employer failed to establish that it had a “defined progressive disciplinary scheme” whereby warnings would “automatically affect job status or tenure”).

Based on the above, I conclude that the evidence establishes that operations supervisors have the authority to effectively recommend the discipline of operators. Accordingly, I find that operations supervisors are supervisors within the meaning of Section 2(11) of the Act. I shall, nevertheless, consider the record evidence presented regarding the other cited indicia.

### **C. Authority to Suspend**

The evidence does not establish that operations supervisors are statutory supervisors based on their authority to suspend operators, as there is insufficient evidence to demonstrate that they suspend bus operators using independent judgment. In evaluating whether an individual has the authority to suspend employees, the Board examines whether a suspension will lead to a personnel action. *Quadrex Environmental Co.*, 308 NLRB 101, 101-102 (1992), citing *Somerset Welding*, 291 NLRB 913, 914 (1988) (leads lacked supervisory authority where, despite having the authority to require employees to leave the worksite due to safety or work performance

problems, the lead would have to alert management of the situation and management would determine, after conducting its own investigation, what, if any, action to take). Likewise, the Board has consistently found that the authority to order intoxicated employees to leave the workplace was not disciplinary as such violations are so apparent that independent judgment is unnecessary. *Chevron Shipping Co.*, 317 NLRB at 381. See also *Alternate Concepts*, 358 NLRB No. 38, slip op. at 5, 2012 WL 1496180, \*7 (2012) (“An ‘on time and fit for duty’ assessment is a routine matter: the individual is either on time or not, and the operator is either wearing the right uniform or not.”); *Lincoln Park Nursing Home*, 318 NLRB 1160, 1162-1163 (1995) (an individual was not a supervisor despite his authority to independently send employees home that posed a safety threat).

The Employer asserts that operations supervisors have the authority to suspend operators when operators fail to comply with the Standards of Excellence work rules. Specifically, the assistant general manager testified that operations supervisors have refused to allow operators to operate a bus if the operator was out of uniform, did not have proof of valid driver’s license or a Department of Transportation (DOT) card, or appeared to be under the influence of drugs or alcohol. As to the inappropriate uniform example, the Employer proffered evidence that, at least on one occasion, an operations supervisor prohibited an operator from even boarding a bus because the operator’s hat did not comply with the uniform policy. A letter from the Employer to the operator details the chain of events: The operator reported to work with a knit hat, which is prohibited by the uniform policy; the operations supervisor instructed the operator to remove the hat before boarding the bus; the operator refused; the operations supervisor referred the operator to the superintendent, an admitted 2(11) supervisor; and the superintendent later met with the operator, along with human resources, to discuss the incident. The assistant general manager

summarily characterizes the operations supervisor's conduct as suspending the operator because the operator was instructed not to board the bus. However, I am not persuaded that this constitutes a suspension. Upon close review, the letter states that the operator "refused to remove the hat and chose instead to leave the building." This description of the events expressly discounts any exercise of authority by the operations supervisor, as the operator chose to remove herself from service.

Furthermore, the Standards of Excellence work rules sets forth a uniform policy that specifically identifies the appropriate types and colors of hats and details the manner in which they can be worn. Knit hats are expressly prohibited. In *Oakwood*, the Board found that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." 348 NLRB at 693. Thus, the evidence establishes that the operations supervisor's role was limited to preventing the bus operator from boarding a bus with a knit hat, a directive that is in accord with the express language of the Standards of Excellence rules. The Board found that authority to determine whether an employee is or is not wearing the proper uniform is "a routine matter" that does not require the exercise of independent judgment. *Alternate Concepts*, 358 NLRB No. 38, slip op. at 5, 2012 WL 1496180, \*7.

Likewise, I am not persuaded by evidence that, on another occasion, an operations supervisor told an operator he could not operate a bus until he had proof of a valid DOT card and driver's license. These documents are required by law and are job requirements set forth in the Standards of Excellence work rules. Thus, the operations supervisor's decision to prohibit an operator from violating the law does not require independent judgment; the violation is so

apparent that independent judgment is unnecessary. *Oakwood*, 348 NLRB at 693. See also *Chevron Shipping Co.*, 317 NLRB at 381.

Finally, an operations supervisor testified that if he suspected an operator of being intoxicated, he could stop the operator from getting on a bus, but he would also have to contact the superintendent and the superintendent would then determine whether to remove the operator from service. The operations supervisor noted that prohibiting the operator from driving did not constitute a suspension or removing the driver from service. The driver was still on the clock until the superintendent decided what, if any, action to take. Thus, the operations supervisor's authority in dealing with a potentially intoxicated driver does not require independent judgment. That authority is reserved for the superintendent.<sup>7</sup> Moreover, as discussed above, actions taken based on a suspicion of intoxication or the influence of drugs do not confer supervisory status based on the egregious nature of the conduct. See *Chevron*, 317 NLRB at 381. In sum, the evidence does not establish that operations supervisors suspend employees within the meaning of Section 2(11) of the Act.

#### **D. Authority to Transfer**

The evidence also does not establish that operations supervisors have the authority to transfer employees within the meaning of Section 2(11) of the Act. Operators are assigned to their positions through bidding procedures established in the collective-bargaining agreement. The Employer nonetheless argues that operations supervisors can move "extra board" and "tripper" operators into specific positions, and that this establishes that operations supervisors possess the authority to transfer employees.

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<sup>7</sup> Notably, on at least one occasion when the Employer discharged an operator for intoxication, the superintendent relied not only on the operations supervisor's report of suspected intoxication, but also on an independent Charlotte-Mecklenburg Police Department sobriety test report and breathalyzer results.

The Board emphasizes that a transfer, which involves moving from one job classification to another, must be identified separately from an assignment, which is interpreted as distributing tasks within a job classification. *Oakwood*, 348 NLRB at 689. Here, the Employer misconstrues the authority to transfer with the authority to assign. Extra board and tripper operators are essentially floaters. Operations supervisors assign them on a daily basis to cover routes for operators who are absent. Thus, the authority to assign these operators to a different route each day does not equate to the authority to transfer them. As noted later, it does even demonstrate the authority to assign employees within the meaning of Section 2(11) of the Act.

#### **E. Authority to Hire**

Contrary to the Employer's contention, I also find that operations supervisors do not enjoy the authority to hire, as there is insufficient evidence to demonstrate that they independently hire or effectively recommend the hire of bus operators. To confer Section 2(11) status, a purported supervisor's authority to effectively recommend the hiring of an employee must be independent of further interviewing or review of the candidates by other acknowledged supervisors. *Republican Co.*, 361 NLRB No. 15, slip op. at 5, 2014 WL 3887221, \*7. Providing an assessment of a candidate's technical expertise, while another official determines whether the candidate should be hired, does not confer supervisory authority. *Id.*, slip op. at 6, 2014 WL 3887221, \*9, ("editor was not a supervisor where his function was to let superior know if applicants were technically qualified, while superior determined if they would 'fit into' the employer's operation"), citing *Aardvark Post*, 331 NLRB 320, 320-321 (2000). See also *The Door*, 297 NLRB 601, 602 (1990) (evidence that an individual screened resumes, reviewed applicants' technical ability to perform the job duties, and recommended an applicant on the



basis of technical ability, was insufficient to establish supervisory status in the absence of evidence that an applicant was actually hired as a direct consequence of the recommendation).

Here, the only evidence of hiring authority is that that lead operations supervisors have occasionally participated in interviews and have compiled the interviewers' ratings and rankings of operations supervisor candidates. The parties agree, however, that lead operations supervisors should be excluded from the unit. The record is devoid of any evidence that operations supervisors play any role in hiring bus operators. Accordingly, I find that operations supervisors do not possess the authority to hire within the meaning of Section 2(11) of the Act.

#### **F. Authority to Promote**

The Employer does not contend that operations supervisors have the direct authority to promote employees. Instead, it argues that operations supervisors can effectively recommend promotions because they evaluate participants in the Employer's "Management Skills Training" program. I find that there is insufficient evidence to demonstrate that operations supervisors promote within the meaning of Section 2(11) of the Act.

To confer supervisory status, the purported supervisor must regularly recommend promotions and the recommendations must be an "effective instrument in making the promotions." *United States Gypsum Co.*, 116 NLRB 1140, 1143 (1956). See also *Exeter Hospital*, 248 NLRB 377, 377 (1980) (supervisory authority found where charge nurse recommendation for promotion always granted without interference from other management).

The Management Skills Training program is a four- to six-week program for bus operators who want to learn the skills and job functions of the Employer's various management positions. Operations supervisors review and evaluate the operator's performance during the program while they, too, are participants in the program. The evaluation covers the operator's

ability to handle stress, their attendance and punctuality, their communication skills, comprehension of instruction, customer service skills, decision making skills, initiative, leadership and management skills, personal appearance, productivity, professionalism, quality of work, and team work. The operations supervisor ranks the applicant on a scale ranging from “poor” to “excellent,” provides topic-specific remarks, and provides an overall recommendation.

Though the Employer asserts that completing these training program evaluations constitutes authority to promote, management does not simply rely on operations supervisors’ review. The acknowledged supervisors who make the final decision to promote employees not only review operations supervisors’ evaluations, they also conduct their own interviews and separately evaluate each candidate. I find that there is insufficient evidence that operations supervisors promote employees within the meaning of Section 2(11) of the Act.

#### **G. Authority to Assign**

I find that operations supervisors do not have the authority to assign bus operators within the meaning of Section 2(11) of the Act, as there is insufficient evidence to demonstrate that they exercise independent judgment when they do so. In *Oakwood*, the Board explained that “we construe the term ‘assign’ to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” 348 NLRB at 689. The Board requires the assignment to be made with independent judgment; it cannot be routine or clerical in nature. *Id.* at 693-694.

The Employer asserts that operations supervisors assign bus operators within the meaning of Section 2(11), but its limited examples of their assignments fail to establish the requisite exercise of independent judgment. Specifically, the Employer asserts that operations supervisors

independently assign “extra board” operators to routes each day. As briefly discussed above, extra board operators are those operators who are not assigned to a specific route or bus. They instead fill in for operators who are out sick or are otherwise absent. The Employer asserts that the operations supervisor make the decision whether to utilize these extra board operators to meet service needs.

A former operations supervisor testified that in deciding whether to send an extra board operator, or to select an extra board operator to fill in, she cannot deviate from the Employer’s standard operating procedures or the parties’ collective-bargaining agreement. As such, the decision to send an extra board operator — both whether to send an operator and who to send — is not based on any independent judgment, but is routine in nature. *Regal Health Center*, 354 NLRB 466, 472 (2009) (finding LPNs did not use independent judgment when assigning CNAs to patients or in temporarily transferring them to help on a different floor during their shift based on staffing needs, and not based on nursing expertise or special skills). Although the Employer asserts that the operations supervisor uses discretion in determining whether to send an extra board or tripper operator out, the Employer also acknowledges that it must operate its routes at all times. Therefore, common sense, not independent judgment, dictates that an operations supervisor must enlist an extra board operator or tripper operator to cover a route when the regularly assigned operator is absent or when a service issue arises. *Oakwood*, 348 NLRB at 689 (2006). Such ad hoc instructions that an employee engage in his pre-determined job duties do not confer supervisory status because the instructions do not require independent judgment. *Brusco Tug & Barge*, 359 NLRB No. 43, slip op. at 5, 2012 WL 6673076, \*7 (2012).

The Employer also asserts that operations supervisors use their independent judgment to assign operators by managing the timekeeping system that records operator work assignments.

Operations supervisors enter information, such as the operator's identification number, hours worked, and duty assignment, into the system, which records their time and affects their pay. This work involves routine maintenance of existing information, reflecting a clerical assignment. There is insufficient evidence to demonstrate that entering this data requires the use of independent judgment.

The Employer also asserts, summarily, that operations supervisors exercise independent judgment by assigning operators to specific buses; assigning extra board and tripper operators to help with service challenges; determining whether a service challenge exists; and deciding whether to take a bus out of service. It is undisputed that routes must be kept in service. As explained previously, operations supervisors testified that these assignments are made in accord with the Employer's standard operating procedures and the collective-bargaining agreement. There is no specific record evidence explaining how operations supervisors determine which operators drive which bus each day, beyond testimony and email evidence that the buses must be operational. In addition, there is no specific record evidence otherwise explaining how operations supervisors determine whether an extra board or tripper operator is needed for a service challenge. The Employer presented a log of various tripper operators being sent out on service challenges. However, the log does not provide any insight into how such assignments are made. Thus, there is insufficient evidence to demonstrate that operations supervisors exercise independent judgment in assigning operators, including extra board and tripper operators.

#### **H. Authority to Reward**

The evidence does not establish that operations supervisors have the authority to reward employees within the meaning of Section 2(11) of the Act. There is insufficient evidence to demonstrate that operations supervisors independently reward or effectively recommend

rewarding bus operators. To establish the authority to reward employees, the Board requires evidence of the purported supervisor's ability to affect employee status, tenure, or to affect personnel actions. *Willamette Industries*, 336 NLRB at 744.

Operations supervisors conduct both monthly and annual evaluations for operators on their team. The evaluations involve ride-alongs and overall observation of the operator's performance. The operations supervisor completes an evaluation form, which is a standardized checklist with space for additional comments about the operator's attendance history, accidents, customer service, performance, and compliance with work rules. The evaluation form is then submitted to and reviewed by the superintendent. The superintendent then sets forth additional goals for the operator. The assistant general manager testified that these performance evaluations assist with quality checks and safety issues and are taken into account when decisions are made about the "future of an employee." The evaluations do not result in compensation for operators, as the compensation structure is solely dictated by the collective-bargaining agreement. Thus, even though operations supervisors regularly evaluate the operators, there is insufficient evidence to demonstrate that these evaluations have any impact on the operator's wages or tenure, especially given the parameters of the collective-bargaining agreement. The assistant general manager's assertion that the evaluations could impact the future of an operator is vague, conclusory testimony, and cannot be relied on to establish the authority to reward.

The Employer also contends that operations supervisors can congratulate operators or acknowledge when operators are doing well. The assistant general manager provided an example of an operations supervisor independently printing a congratulatory certificate and giving it to an operator. In another example, an operations supervisor completed a customer

service follow up report on behalf of an operator, commending the operator for her dedication. However, there is no evidence that these examples affected the operators' status or tenure, or that they affected personnel actions.

On performance improvement plan follow-up forms, operations supervisors can acknowledge improved performance, congratulate successful performance, or give certificates to employees in recognition of good performance. An operations supervisor, however, testified that even though he can recognize an employee's improved performance, such recognition does not have any effect on discipline or other consequences that could result from the plan, as that decision rests solely with higher level managers.

In sum, despite that operations supervisors partially complete operators' evaluation forms and acknowledge operator improvements or positive performance, they do not possess the authority to reward employees within the meaning of Section 2(11) of the Act.

#### **I. Authority to Responsibly Direct**

The evidence does not establish that operations supervisors have the authority to responsibly direct, as there is insufficient evidence to demonstrate that operations supervisors are held accountable for the performance of operators. The Board has held that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Oakwood*, 348 NLRB at 691-692. The Board further stated that, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse

consequences for the putative supervisor if he/she does not take these steps.” Id. at 692. See also *RCC Fabricators*, 352 NLRB 701, 739 (2008) (to possess authority to responsibly direct subordinates, foremen must be subject to adverse consequences for insufficiencies in subordinates’ performance).

There is insufficient evidence that operations supervisors are responsible for the operators’ performance. To support its position, the Employer explains that operations supervisors responsibly direct operators by sending extra board and tripper operators to various locations to maintain bus service; coordinating and assigning supervision for special events; responding to security related incidents and exercising discretion on how to address the incident; and reviewing the performance of the operators on their team. However, I am not persuaded by the cited examples as these examples demonstrate only that operations supervisors are responsible for the performance of their own job duties, not the performance of their team. This is confirmed by my review of an operations supervisor’s evaluation, which demonstrates, for example, that while it is the operations supervisor’s duty to perform safety checks and evaluate the performance of the operators, the operations supervisor is evaluated based on the number of safety checks completed, not on the results of the safety checks or the operators’ compliance with safety regulations, which would reflect accountability for operators’ performance.

#### **J. Authority to Adjust Grievances**

The evidence does not establish that operations supervisors have the authority to adjust grievances. Where the record evidence is insufficient to demonstrate that individuals adjust grievances, the Board will not find supervisory status on the basis of that supervisory indicia. *Avante At Wilson*, 348 NLRB 1056, 1057 (2006) (no supervisory authority in the absence of evidence that staff nurses actually participated in the grievance-adjustment process, even though

the contract language explicitly stated that employees could present their complaints to their “immediate supervisors” for adjustment and some employees understood staff nurses to be their “immediate supervisor.”) The Board has held that limited authority to resolve minor disputes or to address personality disputes is insufficient to establish supervisory status. *Ken-Crest Services*, 335 NLRB 777, 779 (2001) citing *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991); *Illinois Veterans Home at Anna*, 323 NLRB 890, 891 (1997); *Ohio Masonic Home*, 295 NLRB at 394; *St. Francis Medical Center-West*, 323 NLRB 1046, 1048 (1997).

Here, there is insufficient evidence to show that operations supervisors have the authority to adjust grievances. Both the general manager and assistant general manager testified that, pursuant to the bus operators’ collective-bargaining agreement, the superintendent, assistant general manager, general manager or their designee can represent the Employer in the grievance process, and that designee could be an operations supervisor.<sup>8</sup> However, the examples of appointed designees were lead operations supervisors, a position excluded from the unit. In one instance, the lead operations supervisor was serving as “acting superintendent of operations” at the time of his designation. The record is devoid of any evidence of operations supervisors serving as the designee in their capacity as an operations supervisor.

The Employer also asserts that operations supervisors can adjust employee grievances by responding to “Runaround Claim” forms. Operators complete a claim form when they believe they have not received the correct task or route pursuant to the procedures in the collective-bargaining agreement. When an operator submits a claim, the Employer asserts that the operations supervisor investigates the issue raised and responds. However, examples of this in

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<sup>8</sup> At this point in the testimony, the transcript reflects that the general manager is referring to the “drill manager” and “assistant drill manager.” In context, it is clear that the general manager is actually referring to the “general manager” and “assistant general manager.”



the record are claim forms that lead operations supervisors have completed. Again, lead operations supervisors who are not part of the petitioned-for unit. A former operations supervisor testified that her only role in this process was to inform a superintendent that an operator was pursuing a claim. In sum, there is insufficient evidence to demonstrate that operations supervisors have the authority to adjust operator grievances.

#### **K. Secondary Indicia of Supervisory Status**

The Board will only consider secondary indicia of supervisory status when, as demonstrated here, there is evidence that the purported supervisors possess at least one primary indicia of supervisory status. *Ken-Crest Services*, 335 NLRB at 779 (in the absence of primary supervisory indicia, secondary indicia cannot be relied on to establish supervisory status). As I conclude that operations supervisors can effectively recommend discipline, I will briefly discuss secondary indicia supporting their supervisory status.

The Board has held that the ratio of acknowledged supervisors to employees is secondary indicia that can support a finding of supervisory status. See *Loparex LLC*, 338 NLRB 1224, 1238-1239 (2009) (ratio considered when one supervisor for one employee because improbable where work is unskilled and does not require extensive supervision); *Harborside Healthcare*, 330 NLRB 1334 (2000) (ratio of 38 employees to 33 supervisors considered and found unreasonable). In *Pennsylvania Truck Lines*, 199 NLRB 641, 642 (1972), the Board, in finding strip supervisors and dispatchers to be Section 2(11) supervisors, stated, “if strip supervisors and dispatchers were found to be nonsupervisory, there would be no more than three supervisors — the terminal manager, the assistant terminal manager, and the operations manager — at any of the Employer’s terminals, some of which have as many as 100 drivers, and there would be no supervisors at the terminals on weekends, when a dispatcher or strip supervisor is in charge.”

If operations supervisors are non-supervisory employees, the Employer would have a total of 10 supervisors — the general manager, assistant general manager, three superintendents, and five lead operations supervisors — supervising 640 employees (the 600 operators and approximately 40 operations supervisors). The ratio would be one supervisor for about every 60 employees, assuming the general manager would be involved in the immediate supervision of the operators and operations supervisors. Although not all 600 operators and 40 operations supervisors work at the same time because the Employer's operation is a 24-hour service, any distribution of rank-and-file employees among shifts with only 10 supervisors would create an extraordinarily low ratio, and would likely result in ineffective supervision. Finding operations supervisors to be Section 2(11) supervisors makes the overall supervision of operators more practicable and realistic with a ratio of approximately one supervisor for every 15 operators, which is consistent with the Employer's current team structure.

## **CONCLUSIONS AND FINDINGS**

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction here.
3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

## ORDER

**IT IS ORDERED** that the petition be, and it hereby is, dismissed.

### RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington D.C. 20570-0001. This request must be received by the Board in Washington by **May 7, 2015**. The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>9</sup> but may not be filed by facsimile.

Dated at Winston-Salem, North Carolina on this 23<sup>rd</sup> day of April 2015.



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Claude T. Harrell Jr., Regional Director  
Region 10, Subregion 11  
National Labor Relations Board  
4035 University Parkway, Suite 200  
Winston-Salem, NC 27106

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<sup>9</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov), select File Case Documents, enter the NLRB Case Number, and follow the detailed instructions.